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No. 83-1629

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IN THE

Supreme Court of the United States  
OCTOBER TERM, 1983

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LULA B. MILLER,

*Petitioner,*

vs.

MERCY HOSPITAL, INC.  
d/b/a MERCY HOSPITAL.

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On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fourth Circuit

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BRIEF FOR MERCY HOSPITAL, INC.  
IN OPPOSITION TO PETITION

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The Purported "Issue" Presented By the  
Petition Would Not Arise and Should Not  
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Circuit Court Decision in This Case

The Petition argues that the Court  
should rule definitively whether and to what

extent a trial court's credibility resolutions are subject to appellate review.

As Mercy Hospital will demonstrate below, this purported "issue" presented by the Petition would not arise and should not be decided upon any review of the Circuit Court decision in this case. Furthermore, no holding in the opinion below should advise the Court's discretion to review the unanimous panel decision or to remand the case upon the issue that the Petition asserts is presented.

Indeed, a lengthy brief in opposition is deemed unnecessary, because the well-written and legally sound analyses and conclusions set forth with painstaking care in the Circuit Court opinion argue very persuasively for themselves. This Brief will merely highlight certain portions of the

opinion below, conclusively demonstrating that the Circuit Court has applied only elemental, well-established elaborations by this Court and by the Circuit Courts upon the familiar "clearly erroneous" appellate review standard.

The Court will observe that the Petition misrepresents the eminently sound and familiar bases for the Circuit Court's conclusions, by quotations from the opinion that are violently torn from their contexts and by quotations containing editorial deletions that completely alter the plain meaning of the panel's carefully-chosen words. Seeking to persuade the Court that credibility resolutions based upon demeanor of witnesses have been "reversed", the Petition ignores the panel's plain holdings that it could not "refind" the facts and was not

doing so, and that it could not make de novo credibility assessments and was not doing so.

Instead, the Circuit Court explicitly and correctly applied the familiar "clearly erroneous" review standard and concluded that the District Court's ultimate findings were "not supported by the requisite preponderance of evidence" or, "obversely" stated, were "against the clear weight of the evidence" (46a). Stating this conclusion, the Circuit Court held that "mistakes" in the "fact-finding process" required reversal of the District Court's decision. As shown below, these "mistakes" were carefully and thoughtfully specified and delineated, and the Circuit Court's review process and its ultimate conclusions were thoroughly

supported by undeniably settled and controlling authorities.

"We review [the 'ultimate motivational finding'], along with any subsidiary findings of fact upon which it is based, under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Swint, 456 U.S. at 290, 102 S. Ct. at 1791. For reasons that follow, we pause briefly to consider the special application of [the clearly erroneous] standard to motivational issues in Title VII litigation.

"In the Supreme Court's oft-cited elaboration of the 'clearly erroneous' standard, we have been instructed that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 338 U.S. 364, 396 . . . (1948). Efforts at further refinement of this judgmental standard are not likely to give it much greater precision than does the Gypsum Co. formulation. Nevertheless, because in this case we are 'left with a definite and firm conviction that a mistake has been committed' and because of the particular sensitivity of the standard's application to ultimate motivational issues in Title VII

litigation, see, e.g., Swint, 456 U.S. at 275-77 . . . , we elaborate briefly upon our understanding of the ways in which an appellate court may properly be 'convinced' that a 'mistake' in fact-finding has been made.

"We start with the proposition that such a conviction [of mistake] may not be based simply upon a perception derived from de novo review of the record that the 'actual' facts are other than those found, see, id. at 290-98 . . . ; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 . . . (1969). . . . Thus, the conviction of mistake may properly be based upon a conclusion that, without regard to what the 'actual' facts may be, the findings under review . . . were made without properly taking into account substantial evidence to the contrary or are against the clear weight of the evidence considered as a whole, Jones v. Pitt County Board of Education, 528 F. 2d 414, 418 (4th Cir. 1975); Sanders v. Leech, 158 F. 2d 486, 487 (5th Cir. 1946). In sum, these [authorities] establish that 'clearly erroneous' review is properly focused upon fact-finding processes rather than directly upon fact-finding results. The appellate function is to insure that the process shall have been principled; the function is not authoritatively to find the 'facts' in the first instance, or to affirm or deny that

the facts 'found' by the trial court  
are the 'actual' facts of the case.

"On this understanding, we are convinced that several mistakes in its fact-finding process render the district court's critical findings of fact clearly erroneous. Primarily, we are convinced that the court's finding on the ultimate motivational issue . . . is not supported by the requisite preponderance of evidence.7/ . . . (40a-46a).

. . .

"With all respect, and after according the district judge's better vantage point the difference we must, we are convinced that the critical findings of intentional discrimination . . . cannot be allowed to stand. More specifically, we are convinced that to find as the district court found on this ultimate issue of fact -- an issue upon which plaintiff had the burden of persuasion -- required

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"7/ This puts somewhat obversely the more common way of stating this particular basis for holding that a finding is clearly erroneous: that the finding is against the clear weight of the evidence. See, e.g., Jackson v. Hartford Accident & Indemnity Co., 422 F. 2d 1272, 1275-78 (8th Cir. 1970) (Lay, J., concurring). . . ."

a process of speculation or intuition rather than of legally justifiable inference from the evidence. We are therefore left with a definite and firm conviction that a mistake in the fact-finding process has been made which renders the finding clearly erroneous. Because so to conclude is serious business, not lightly to be done, we explore the record in some detail to explain the basis for our conviction (62a-63a).

". . . Giving 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses,' Fed. R. Civ. P. 52(a), we simply do not believe this credibility assessment can serve as a rational basis for the critical fact findings here. The special advantage had by the trial court as opposed to ours in review of credibility assessments is in relation to the opportunity to observe witnesses' demeanor. But, of course, '[c]redibility involves more than demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.' 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2586, pp. 736-37 (1971) [Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963), cert. den. sub nom. Palermo v. United

States, 377 U.S. 953 (1964); and Jackson v. United States, 353 F. 2d 862, 866 (D.C. Cir. 1965)] (63a-64a). . . .

. . .

"We explore [witnesses' testimonies] in this much detail not to make, de novo, a contrary credibility assessment . . . , but simply to indicate our inability to accept the district court's stated perception that the inherent credibility of Miller's testimony provided a sufficient basis for accepting all of its critical content. We think the only fair characterization of Miller's testimony is that it was rendered at least as suspect as that of [the Hospital's witnesses] by virtue of demonstrably failed recall, internal inconsistency, and contextual ambiguity. . . .

". . . Trial judges are assuredly better situated to detect [a 'stonewalling'] technique of perjury than are appellate courts sitting in review. But where, as here, the failures of recall asserted on one side are matched by unconceded but demonstrated failures of equal or greater magnitude on the other and where, as here, a long lapse of time and the banality of the events as they occurred may well explain both sets of recall failures, it would seem a most questionable fact-finding process to reconcile them by completely forgiving one

set of failures and ascribing the other to perjury by stonewalling. To the extent that this is what underlies the district court's credibility assessments here, we are convinced that a mistake in the fact-finding process has been made (70a-72a).

. . .

"We conclude this generally unwanted and always somewhat treacherous review of trial court fact-finding processes with a particularly distasteful, but necessary, reference to an aspect of the processes employed here that bolsters our conviction of mistake. Mercy, as appellant, has legitimately complained on appeal of the practice followed by the district court in formulating its findings of fact. We have earlier outlined the procedure: The court announced its general decision finding liability; requested plaintiff's counsel to prepare proposed findings, conclusions and judgment; then adopted those proposed with minor revisions and two additions and with no formal opportunity given opposing counsel either to submit proposed alternatives or specifically to object to those proposed before their adoption.

"In a series of decisions, most recently in Anderson v. City of Bessemer City, 717 F. 2d 149 (4th Cir. 1983)

and Lilly v. Harris-Teeter Supermarkets, 720 F. 2d 326 (4th Cir. 1983), we have expressed varying degrees of disaffection with and disapproval of the general practice. See also EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 639-41 (4th Cir. 1983) (citing cases). . . .

". . . The . . . danger -- which we think fully exemplified here -- is that the practice tends to deflect the court's attention from, or actually to obscure, the more difficult factual issues and credibility problems presented by the evidence. The natural tendency of counsel given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of 'findings,' is obvious. In effect, the practice gives to one side but not the other a final, second opportunity to argue the case to the fact-finder, free of rebuttal, and essentially ex parte. Though tentative decision may by then have been reached, and may at the time reflect a firm judicial conviction, it is still at this point tentative -- the decisional process is still in progress. . . .

"Here we are satisfied that this potential vice of the practice almost certainly skewed the fact-finding

process. As our discussion has indicated, the findings as drafted by plaintiff's counsel and adopted by the district court were highly argumentative in form and notably selective in overemphasizing the probative force of some evidence while glossing over or wholly disregarding unfavorable evidence of obviously serious import. . . . We can only say with assurance that had defendant's counsel been given an equal opportunity before final decision was reached to force consideration of evidence opposing the findings adopted or to demonstrate the rationality of contrary findings, we are satisfied that the district court would have been forced to critical reexamination of portions of the findings actually made.

"We close as we began with the observation that the purpose of our review of the district court's dispositive findings of fact in this or any case is not to affirm or to deny that the 'actual' facts of this controversy are as that court 'found' them to be. . . . Assessed according to legal standards of rationality in drawing inferences of motivation from raw historical facts in evidence and under controlling burdens of proof, the ultimate finding of discriminatory motivation in this case must be rejected as clearly erroneous" [Emphasis added.] (78a-85a).

The Circuit Court could hardly have more clearly specified that it was not disturbing any credibility resolutions by the trial court. The panel opinion does carefully exposit specific "mistakes" in the District Court's "process" of weighing the evidence it credited, concluding as a matter of law, in accordance with proper "clearly erroneous" standards, that the ultimate findings for Ms. Miller were not "supported by the requisite preponderance of evidence."

The Court of Appeals also properly concluded that the trial court's wholesale, uncritical adoption of findings written by Ms. Miller's counsel constituted a "mistake" affecting the fact-finding process and resulting in "mistaken" weighing of the evidence. As the Circuit Court noted, the District Court's adoption of an advocate's

one-sided proposed findings -- that conveniently ignore damaging admissions and unrebutted adverse evidence -- had on previous occasions been faulted by the Court of Appeals.

". . . [A] fair compliance with [Rule 52(a), Fed. R. Civ. P.] 'requires the trial court to find the facts on every material issue, including relevant subsidiary issues, and to "state separately" its conclusions thereon with clarity.' [Citations omitted.]

"All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944), to comment that the adoption of 'findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court,' under the Rules. This is so because an appellate court will '"feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge' [citation omitted].

• • •

"The adoption by the district court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the "'clearly erroneous'" rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge.

• • •

"When the findings of fact and conclusions of law adopted by the District Court have been given that 'careful scrutiny' by the appellate court that is required under such circumstances and have been 'more narrowly' examined . . . , and when, the reviewing court, on the entire record, 'is left [after such review] with the definite and firm conviction that a mistake has been committed,' United States v. Gypsum Co., 333 U.S. 364, 395 (1948), or it is convinced that 'the result in a particular case does not reflect the truth and right of the case,' Armstrong Cork Co. v. World Carpets, Inc., 597 F. 2d 496, 501 (5th Cir. 1979), cert. denied, 444 U.S. 932, it is the duty of the appellate court to

reverse the findings and conclusions as clearly erroneous."

Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 640-642 (4th Cir. 1983)

It is respectfully submitted that these rulings, fully supported by controlling authorities, do not suggest any possible ground or reason for review or remand by this Court.

Conclusion

Upon all of the foregoing, Mercy Hospital, Inc. earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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